

222346

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

STB EX Parte No. 676

RAIL TRANSPORTATION CONTRACTS UNDER 49 U.S.C. 10709

**COMMENTS OF
NORFOLK SOUTHERN RAILWAY COMPANY**

**James A. Hixon
George A. Aspatore
Greg E. Summy
John M. Scheib
Norfolk Southern Corporation
Three Commercial Place
Norfolk, VA 23510**

***Counsel to Norfolk Southern
Railway Company***

Dated: May 12, 2008

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

STB EX Parte No. 676

RAIL TRANSPORTATION CONTRACTS UNDER 49 U.S.C. 10709

**COMMENTS OF
NORFOLK SOUTHERN RAILWAY COMPANY**

Norfolk Southern Railway Company ("NS") hereby joins and incorporates by reference the comments of the Association of American Railroads and submits these comments in connection with the Surface Transportation Board's ("STB" or "Board") decision served March 12, 2008 in the above proceeding.

In its Notice served March 12, 2008, the Board proposed a requirement that a carrier provide, when it seeks to enter into a rail transportation contract under the provisions of 49 U.S.C. 10709,¹ a statement that would "explicitly" advise the shipper that "the carrier intends the document to be a rail transportation contract under the provisions of 49 U.S.C. 10709, and that therefore any transportation under the document would not be subject to regulation by the Board;" and that the shipper "has a statutory right to request a common carriage rate that the carrier would then have to supply promptly, and such a rate might be open to challenge before the Board" (hereinafter referred to collectively as a "Full Disclosure Statement"). The Board's proposal would

¹ The Board's proposal applies only to contracts under 49 U.S.C. 10709 for the movement of otherwise regulated commodities. NS's comments are confined such contracts and are not directed at transportation that has been otherwise exempted from regulation by the Board (or its predecessor the Interstate Commerce Commission) pursuant to 49 U.S.C. 10502 (or former 49 U.S.C. 10505) or to those agricultural contracts separately addressed by statute.

also require that “before entering into a rail transportation contract, the carrier provide the shipper an opportunity to sign a written informed consent statement in which the shipper acknowledges, and states its willingness to forgo, its regulatory options” (hereinafter “Informed Consent”).

The Board’s proposals as currently envisioned are beyond the Board’s statutory authority. Moreover, the imposition of the proposed requirements would be counterproductive and possibly lead to “unintended consequences” as discussed below.

What the Board could do – and should do – is create a safe harbor that any pricing document that contains a statement that it is a contract under 49 U.S.C. 10709 and is clearly agreed to by the customer is not subject to regulatory review by the STB, unless a court declares that the document is not a contract.

II. Argument

A. The Board Does Not Have the Statutory Authority to Impose the “Full Disclosure Statement” and “Informed Consent” Requirements as a Regulatory Precondition to the Existence or Validity of a Rail Transportation Contract under 49 U.S.C. 10709

The statute and court decisions make clear that the STB has no jurisdiction over contracts and no authority to examine or impose requirements in contracts. The Board’s current proposal would improperly thrust the Board into the court’s arena of establishing the criteria and examining the facts and circumstances to determine when a contract exists and when one does not. In Ex Parte 669, NS submitted comments explaining that questions of contracts reside in the courts and cited substantial precedent, including the Board’s own precedent. Comments of Norfolk Southern Railway Company, Ex Parte No. 669, Interpretation of the Term “Contract” in 49 U.S.C.10709, at 3-4. NS hereby

incorporates those comments here. Thus, precedent shows that courts determine whether a contract exists and what the terms of the contract are. The Board lacks the power to announce that any term must be included in a document for that document to constitute a contract.

The Board's proposals in this proceeding improperly attempt to impose regulatory preconditions for entering into contracts. Neither a Full Disclosure Statement nor an Informed Consent Requirement, which is merely a second document for a contracting party to sign to show that another document the contracting party accepted was a contract, are legal requirements for creating a contract. The Board has no authority to impose these requirements as a precondition of a valid transportation contract under 49 U.S.C.10709. What is a valid contract under Section 10709 is solely a matter for the courts to determine based on the parties' intent and other relevant circumstances.

Nevertheless, the Board would have the authority to create a safe harbor that any pricing document that contains a statement that it is a contract under 49 U.S.C 10709 and is clearly agreed to by the customer is not subject to regulatory review by the STB, unless a court declares that the document is not a contract. And the Board should do so.

B. The "Informed Consent" Statement is Beyond the Board's Jurisdiction and is Both Unnecessary and Counterproductive.

In addition to the fact that the Board does not have the statutory authority to impose the Informed Consent requirement, that requirement is bad policy. It has the potential to complicate the contract process and make it more difficult for carriers and shippers alike.

The Board's proposed Informed Consent requirement is a step backward from the Staggers Act and ICCTA deregulatory reforms pertaining to rail transportation contracts. It was Congress's clear intent, in enacting 49 U.S.C. 10709 (and former 49 U.S.C. 10713), that the Board encourage the use of rail transportation contracts to the maximum extent possible and not attempt to impede the process in any manner. *See, e.g.,* H.R. Rep. No. 96-1430, 96th Cong., 2d Sess. (Sept. 29, 1980) at 2 (noting that Staggers Act contract provisions intended to "encourage carriers and purchasers of rail service to make widespread use of [contracts]"); H. R. Rep. No. 104-311, 104th Cong., 1st Sess. (Nov. 6, 1995) at 99 ("[contract] provision retains the Staggers Act's very successful encouragement and legal authorization of customized and confidential rate contracts between shippers and carriers"). Instead, the Board's Notice appears to be encouraging a more cumbersome and adversarial relationship between carriers and shippers in the contract process.

The proposal could also unnecessarily delay the implementation of contracts. This delay would result because the proposal adds an additional step in the contract negotiation and formation process. This would occur where a shipper is attempting to move product quickly at an advantageous price or other terms. It would also occur where the rail carrier is trying to meet a competitive offer by a trucking firm or other carrier competitor. Such delay is not good for railroads or their customers.

The proposed Informed Consent requirement is inconsistent with modern contract law and technology. For example, signatureless contracts are contracts under the law. Modern technology and means of communication facilitate parties' use of signatureless contracts, which themselves make it easier to conduct business in a timely fashion. The

Board's proposed Informed Consent requirement, which seems to contemplate the customer accepting two documents – the contract and the Informed Consent, would neuter the railroads' and customers' ability to use these business tools.

The proposed requirement would put railroads at a substantial disadvantage vis-à-vis competitors from different modes of transportation, which is not in the public interest of reducing highway congestion. The railroads' trucking and barge competitors do not have to deal with an "informed consent" requirement in negotiating contracts and neither should rail carriers pursuant to the statutory language and intent of the contract provisions. The proposed rule would create delay and additional hurdles to entering a contract with a railroad – thereby making railroads less nimble in the transportation marketplace

Finally, the Board's proposal has the potential to create uncertainty in the contract process. While the Board's proposal requires the carrier to provide the shipper an "opportunity" to sign an "informed consent" statement before entering into a contract, the proposal does not require that the shipper sign it before a contract is entered into. If the shipper subsequently enters into the contract (but does not sign an "informed consent" statement), and the carrier accepts the shipper's action as full assent, meaning that a contract has been created under the law, adding an unsigned informed consent to the factual milieu could create confusion with no benefits. There is no certainty how the Board would view the situation. And courts and the Board might view the situation differently.

Conclusion

The Board proposals, as currently contemplated, are fundamentally flawed. However, the Board may want to consider creating a safe harbor that any pricing document that contains a statement that it is a contract under 49 U.S.C. 10709 and is clearly agreed to by the customer is not subject to regulatory review by the STB, unless a court declares the document is not a contract.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Greg E. Summy", written over a horizontal line.

Greg E. Summy
Norfolk Southern Railway Company
Three Commercial Place
Norfolk, VA 23510

May 12, 2008